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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1232

G. F. HOWARD, PETITIONER

v.

UNITED STATES EX REL. S. S. ALEXANDER, C. C.
COOK, R. H. ALLISON, R. A. DAVIS, C. P. DUGAN,
D. W. HELT, F. F. COWLEY, H. HEMENWAY, A. H.
JONES, R. F. RAY, AND J. H. SYLVESTER, MEMBERS
OF THE THIRD DIVISION OF THE NATIONAL RAIL-
ROAD ADJUSTMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94-96) has not been reported. The district court rendered no opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered March 13, 1942 (R. 96). The petition

(1)

for a writ of certiorari was filed May 11, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court in Kansas has jurisdiction to entertain an action against the members of the National Railroad Adjustment Board residing in Chicago through service of process upon the United States Attorney in Kansas.

STATUTE INVOLVED

The statute and rules involved are set forth in the Appendix (*infra*, pp. 6-7).

STATEMENT

Petitioner, an agent-telegrapher, was discharged by the Chicago, Burlington & Quincy Railroad Company on October 5, 1932, for conduct unbecoming an employee (R. 27-28). Upon the failure of the carrier to reinstate him, he brought suit in a Kansas district court, and in October 1936 recovered a judgment of \$500 for loss of seniority rights (R. 28, 63). In September 1937 petitioner filed a submission of his claim for reinstatement with back pay with the Third Division of the National Railroad Adjustment Board in Chicago.¹ After the Board had dead-

¹ This submission was filed by the Order of Railroad Telegraphers on behalf of petitioner (R. 19-20).

locked on the case a referee was called in (R. 20). On April 7, 1938, the Board held that petitioner had made an election of remedies and that the Board was without jurisdiction over the case after petitioner had sought relief in the civil courts (R. 2-5).

In January 1940 petitioner commenced an action in the United States District Court for the District of Kansas against the members of the Third Division of the Adjustment Board, praying that they be ordered to hear his case on the merits and render an award (*Howard v. Allison*, Civil Action No. 4425). The Adjustment Board is located in Chicago and its members reside there; service was attempted by mail and through the United States Attorney in Kansas. The defendants moved to dismiss the complaint for lack of jurisdiction, and the motion was granted in March or April 1940.

On December 15, 1940, petitioner filed with the Adjustment Board a supplemental submission which was, in effect, a restatement of his position on the merits of the case (R. 27-32). No action is shown to have been taken on this submission.

In April 1941, petitioner instituted the present proceeding, again in the District of Kansas, (R. 68) seeking a writ of mandamus to compel the members of the Adjustment Board to hear and try the supplemental petition and to decide the merits of the case (R. 17-23). Although the prayer sought relief only from the mem-

bers of the Board (R. 23), the "United States ex rel. S. S. Alexander" was also named as a defendant in the caption (R. 17). Service was made only upon Mr. Alexander, the United States Attorney (R. 68).

The Government moved to dismiss on the ground that the United States could not be a party and that the members of the Adjustment Board in Chicago could not properly be served through the United States Attorney in Kansas (R. 68-69). The district court granted the motion (R. 84-85)² and the circuit court of appeals affirmed (R. 94-96).

ARGUMENT

The district court for Kansas has no jurisdiction to issue process to the members of the National Railroad Adjustment Board residing in Chicago. Judicial Code, sec. 51, as amended (28 U. S. C., sec. 112); Federal Rules of Civil Procedure, Rule 4 (f); *Munter v. Weil Co.*, 261 U. S. 276, 279; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 622-624. Jurisdiction over the Board members was not obtained by serving the United States Attorney in Kansas. The rule providing

² The order recites that, plaintiff having appeared without counsel, "the court, in open court, appointed Otis Allen and Hall Smith, members of the bar of this court, to advise the court and submit to the court memoranda on behalf of the plaintiff, setting forth the law in the case, and to advise the court as to whether or not in their judgment plaintiff had any cause of action" (R. 84).

for service on officers of the United States by serving the United States (i. e., the United States Attorney and the Attorney General) and by delivering a copy of the papers to the officers concerned (Federal Rules of Civil Procedure, Rule 4 (d) (4) and (5)) does not enlarge the territorial jurisdiction of the district courts; "delivery" obviously means delivery within the area in which the court has jurisdiction. Moore, *Federal Practice Under the New Rules*, sec. 4.25. If this were not so, any Government official could be sued in every judicial district, regardless of where he might reside or be found.

Petitioner's case is not aided by listing the "United States ex rel. S. S. Alexander" among the defendants. The United States has not consented to be sued, and no relief is sought against Mr. Alexander.

CONCLUSION

The decision below is plainly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Attorney.

MAY 1942.